PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

AIRMAN BASIC ASHONTIA K. HARROW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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September 20, 2007

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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces erred in finding harmless error despite determining that the trial court made three, erroneous, critical rulings—namely:

(1) that the trial judge erred by preventing the defense from impeaching the testimony of the deceased baby's father (the only other person present during the alleged shaking incident) with prior inconsistent statements regarding the baby's interactions with Appellant and regarding the baby's cries after Appellant left the house;

(2) the military judge erred by denying a defense motion in limine to exclude the testimony of various witnesses regarding Appellant's pattern of minor parental abuse where the testimony constituted inappropriate character evidence that was unfairly prejudicial.

(3) the military judge erred by allowing the prosecution's expert witness to present inadmissible profile evidence that placed Appellant in the profiled category and excluded the deceased baby's father—the only other suspect—from the profiled category.

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The petitioner, Airman Basic Ashontia K. Harrow, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on June 22, 2007.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), is located at Appendix A. The published opinion of the United States Air Force Court of Criminal Appeals, *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant parts:

> No person shall be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront the witnesses against him.

STATEMENT OF THE CASE

A general court-martial composed of officer and enlisted members convicted Airman Harrow, contrary to her plea, of the unpremeditated murder of her infant daughter, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (2000). Airman Harrow pled guilty to violations of Articles 86, 107, 121 and 134, UCMJ, 10 U.S.C. §§ 886, 907, 921, 934 (2000), and thirteen specifications thereunder, to include: multiple failures to go, absence without leave, making a false official statement, theft of insurance proceeds, fraud in obtaining phone services, dishonorable failure to pay just debts, and making false claims to secure the approval of a loan. The sentence adjudged by the court-martial and approved by the convening authority included a dishonorable discharge, confinement for twenty-five years, and forfeiture of all pay and allowances.

The Court of Criminal Appeals affirmed all charges except one specification of absence without leave. *United States v. Harrow*, 62 M.J. 649, 661-62 (A.F. Ct. Crim. App. 2006). The Court of Criminal Appeals found that Appellant's plea of guilty to the absence without leave charge was improvident and reassessed her sentence to a dishonorable discharge, twenty-four years and six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E1.

1. The Facts Presented at Trial

Destiny Harrow, the daughter of Airman Harrow, died on November 29, 2000. P.E. 2. An autopsy attributed her death to "shaken baby syndrome." There were no eyewitnesses to the alleged offense and Destiny was at home alone with Antonio Jackson, who was Appellant's boyfriend and Destiny's father, immediately preceding her seizure. The

defense's theory at trial was that Jackson committed the offense.

The key government testimony came from Jackson. On June 22, 2000—the day before the alleged shaking—Jackson claimed Destiny had been "sick." R. 343. He had been with Destiny all that day. On June 23, 2000, Jackson was again left alone with Destiny while Airman Harrow went to work. R. 344. Jackson claimed that he was in the bathroom and Destiny was on the couch when Airman Harrow came home and lay down on the couch to watch television. R. 346-47. At some point, Airman Harrow and Jackson got into an argument. According to Jackson, he was shaving when Appellant "came into the bathroom fussing, just mad" and "arguing with me, screaming." R. 348. Jackson did admit he was also "mad." R. 407.

Responding to leading questions on direct examination, Jackson claimed that Airman Harrow then grabbed Destiny from the couch by one arm. R. 350. She pointed a broom at him, threw objects, and threw Destiny's walker. R. 351. He maintained that Airman Harrow walked around and held Destiny by one arm with "her body just kind of wiggling and jerking around." R. 354. Yet there was no evidence of joint dislocations on her body. R. 329. At that point, Jackson averred that he locked himself in the bathroom while Airman Harrow yelled and screamed and threw objects against the walls. R. 353. Nina Harris, the neighbor, stated that during the argument she heard Destiny crying loudly. R. 458-60. A "bang against [Nina's] wall" knocked a picture down and Destiny's crying stopped. Id. Nina claimed to have heard Destiny "whimper twice and that was it." Id. This was purportedly only five minutes before Appellant left the house "angry" and "raged." R. 461.

Neither Nina's nor Jackson's accounts squared with that of SrA Jason Warren, a Security Forces member who was dispatched at approximately 1445 to contact Airman Harrow because her first sergeant needed her to call work. He arrived at the residence at 1450—in the "thick" of the alleged argument and Appellant's "throwing" fit. When he arrived, he did not hear any yelling, radio, or objects being thrown. R. 448, 450. Airman Harrow answered the door holding Destiny in her left arm on her hip. R. 443-45. According to SrA Warren, Destiny was responsive, made eye contact, and was not bruised in any way. R. 449. Airman Harrow did not appear angry, flushed, or excited and there was no sign that a struggle had occurred in the house. R. 449-50.

In Jackson's account, after watching Airman Harrow leave in her car, he got a bottle for Destiny from her room. R. 356. He laid the bottle in Destiny's hand but she was unresponsive. R. 357. He then went into the bathroom to finish shaving. Id. He could hear Destiny making a gargling sound and he saw vomit hanging from her mouth. R. 358. He picked her up, turned her over, and "hit her a couple times" lightly to get out the vomit. R. 359. Then she started shaking, he could see the whites of her eyes, and her body went limp. R. 360. He then "ran next door" with Destiny to the Harris's for help. R. 361. Nina dialed 911 and an ambulance arrived and took Destiny to the hospital.

While Jackson was cooperative during direct examination, his demeanor changed on cross. He refused to answer basic questions even after having his memory refreshed, forgetting details that could be harmful to him. He did not remember saying that Destiny was laying on the couch crying when he came out of the bathroom after Appellant left. R. 380. However, the agent notes indicated that he told the FBI that he "heard Destiny crying" and "came out of the bathroom 30

seconds later." App. Ex. LV, p. 2. He also told the FBI a second time that when he came out of the bathroom Destiny was crying and that she only stopped after he gave her the bottle. *Id.* at p. 5. Further, in a written statement to OSI dated August 15, 2000, Jackson stated, "Destiny was on the sofa crying so I gave her her bottle and preceded [sic] to the bathroom. A few seconds later I heard a choking and gagging noise . . . ." Vol. 3, Second Art. 32 Investigation, IO Ex. 39, p. 3.

After cross-examination, the court reporter's recording apparatus broke down, leaving a gap from 1420 to 1653 in the record—missing up to 20 minutes of the proceedings. The parties attempted to re-enact the testimony; however, Jackson's actual responses were forever lost.

2. The Erroneous Rulings of the Trial Court

a. Jackson's inconsistent statements

At trial, Appellant argued for admission of extrinsic evidence of two primary inconsistencies in Jackson's testimony: (1) whether Destiny was crying after Appellant left the residence, and (2) Jackson's differing descriptions of Appellant's interaction with Destiny on the day Destiny was injured. The defense argued at trial and again on appeal, that Jackson's in-court testimony on direct-examination was inconsistent with his prior out of court statements.

b. The admission of "bad parent" character evidence

Over defense objection, the military judge allowed the prosecution to present purported "pattern of abuse" evidence regarding Appellant's interactions with Destiny in the months prior to the alleged shaking. This impermissible "bad parent"

character evidence was admitted to demonstrate that Appellant had a violent intent in the past and that it was therefore more probable that she would have a violent intent on the day of the shaking. However, her intent was not at issue. The issue was whether the event happened at all.

c. The Admission of Erroneous Profile Evidence

Over defense objection, the military judge allowed the prosecution to present profile evidence during the testimony of Dr. Cooper, the government expert. Dr. Cooper's testimony was not designed to educate members in understanding the evidence but to exclude Antonio Jackson as a suspect and prove Appellant was the person who shook Destiny. Dr. Cooper set specific parameters on how and when the abuse occurred that excluded Jackson as a viable suspect and pointed to Appellant as the perpetrator. Trial counsel's argument on the merits used these profiles with devastating and unfair impact on Appellant's case.

3. The Ruling of the Court of Appeals.

The Court of Appeals for the Armed Forces found that the trial court erroneously prevented the defense from questioning Antonio Jackson, the only other person who had custody of Destiny in the hours before she was injured, regarding inconsistent statements he had made. Likewise, the Court found that the admission of "bad parent" character evidence was "tenuous at best."

Finally, the Court below found that the trial court impermissibly allowed into evidence profile evidence that implicated Airman Harrow. Notwithstanding these critical rulings, the Court of Appeals upheld the conviction, finding the errors to be harmless.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Armed Forces conflicts with this Court's rulings. This writ should be granted under Rule 10 of this Court's rules.

It is axiomatic that Airman Harrow, like all citizens, has the right under the Sixth Amendment of the Constitution to confront the witnesses against her. This right is primarily secured through the right of cross examination. *Crawford v. Washington*, 541 U.S. (2004); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In cross-examining a witness, an accused is specifically permitted to confront, impeach, or discredit the government's witnesses. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

Of course, a defendant has the right to present legally and logically relevant evidence at trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Chambers v. Mississippi*, 410 U.S. 284 (1973). The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental constitutional right. *Holmes v. South Carolina*, 547 U.S. 319 (2006); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Chambers v. Mississippi*, *supra*; *Webb v. Texas*, 409 U.S. 95 (1972). When the defense is prohibited from doing so, the error must be found to be harmless beyond a reasonable doubt.

Here, the defense should have been permitted to present extrinsic evidence that Jackson had previously stated on numerous occasions that Destiny was crying after Appellant left the house. Jackson's position on direct examination at trial contradicted his earlier statements to investigators on this point. On direct, he testified that after Appellant left the residence, Destiny was not alert and lying motionless on the

couch. R. 356-57. He also testified, on redirect, that the child was quiet on the couch following Appellant's departure. R. 429.

During the re-enactment of Jackson's testimony after the court reporter's recording equipment malfunctioned, even trial counsel recalled a similar statement by the witness, stating, "I remember Jackson saying that it didn't surprise him that the baby was quiet lying on the couch because he knew that she hadn't been feeling her normal self and wasn't feeling well, so it didn't surprise him that the baby was quiet." R. 430. Since there is no verbatim record of trial of this testimony, it is unclear whether he addressed the "crying v. quiet" question in more detail.

Jackson, however, had made prior inconsistent statements to the FBI and OSI regarding whether Destiny was crying after Appellant left. The agent notes reflect that Jackson told the FBI that he "heard Destiny crying" and "came out of the bathroom 30 seconds later." 1 App. Ex. LV, p. 2. He also told the FBI a second time that when he came out of the bathroom Destiny was crying and that she stopped crying after he gave her a bottle. Id. at p. 5. In a written statement to SA Davenport at OSI, dated August 15, 2000, Jackson stated, "Destiny was on the sofa crying so I gave her her bottle and preceded [sic] to the bathroom. A few seconds later I heard a choking and gagging . . . ." Vol. 3, Second Art. 32, IO Ex. 39, p. 3.

The defense sought to call SA Davenport to testify that in a previous interview Jackson stated that after Appellant left, he heard Destiny crying as though she missed her mother. Also, in a written statement, Jackson wrote that after Appellant left, Destiny was crying so he gave her a bottle. App. Ex. LV.

Despite these inconsistencies, the military judge refused to allow the defense to recall SA Davenport to testify about them. The basis for the judge's decision was a misunderstanding of the law regarding impeachment by prior inconsistent statements. The judge seemed to believe that a statement was not inconsistent if a witness did not recall giving the statement. This notion originated with trial counsel during her initial objection:

> TC: And I think a court member even asked that question again and he simply said, "I don't recall. I don't remember." That was my recollection of his testimony. [Note: This referred to testimony that was not recorded due to the equipment malfunction.]
>
> MJ: And that would be my recollection also.
>
> ATC1: And, so, my understanding is that they would want to go into that with Ms. Davenport as a prior inconsistent statement. And, of course, that would not be inconsistent if he had said it previously in an interview and then on the stand said, "I don't remember."
>
> MJ: Sure. And I would agree with that analysis.

R. 849 (notation added). Trial defense counsel disagreed and explained what testimony he recalled to support the admission of a prior inconsistent statement. Specifically, he argued that on the witness stand Jackson had described the scene with Destiny lying unalert on the couch and that he had left out any reference to her crying. *Id.* The military judge, relying on his own recollection, replied:

[M]y recollection was when that was inquired into, I think that he said he didn't remember when he was asked about crying. That's my recollection of it. And if he said, "I don't remember" as opposed to "No I didn't" then you don't have an inconsistent statement. It's only when he denies the statement was made.

R. 849-50 (emphasis added). Trial defense counsel persisted, explaining that both on direct and cross-examination the witness had described Destiny at that time as "limp and non-responsive." R. 850. The defense proffered that SA Davenport would testify that Jackson had told OSI that Destiny was "crying as if she missed her mother because she had just left" after Appellant left the house. *Id.*

The military judge refused to accept the defense proffer, stating that "[a]ccording to my notes . . . I don't see anything in here in which [Jackson] denied that she was crying." *Id.* Despite further persistence by the defense, the military judge ruled: "Counsel, according to my notes, it was non-responsive as far as denying that. So for that particular aspect of that one question, I would not allow that, based on my notes. I simply don't have it in there." R. 851.

The military judge and trial counsel were apparently confusing another concept related to prior inconsistent statements. Under the rule, if a witness admits to making the inconsistent statement, extrinsic evidence of that statement is generally not permitted. However, if a witness denies making the statement—or cannot remember whether or not he made it—then extrinsic evidence can be used.

It is Jackson's answers to trial counsel, on direct-examination and redirect (from what can be discerned from the reconstructed redirect testimony), which constitute statements

inconsistent with his prior out of court statements to investigators. This is what trial defense counsel argued at trial.

See R. 849. His later response on cross-examination that he did not remember making the prior inconsistent statement, was an equivocation, at best, and far from an acknowledgment of the prior statement.

The Court of Appeals for the Armed Forces found the judge's prohibition against the defense to be error, but applied a non-constitutional harmless error analysis under *Kotteakos v. United States*, 328 U.S. 750 (1946).

The Court of Appeals for the Armed Forces also found that the trial judge improperly and erroneously allowed the members to consider `bad parent' character evidence and improper profile evidence. Yet the lower court dismissed these clear evidentiary errors because the "minor acts" admitted and the improper profile evidence were harmless. In doing so, the lower court totally ignored the cumulative effect that such multiple errors caused.

As Chief Judge Posner has written for the Seventh Circuit, "[I]n assessing whether a conviction should be upheld despite the presence of error, a court is required to assess the harm done by the errors considered in the aggregate." *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). Indeed, "the cumulative effect of trial errors may deprive a defendant of his constitutional right to a fair trial." *Id.* (quoting *United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996)).

In its decision below, the United States Court of Appeals for the Armed Forces incorrectly concluded that even though Petitioner could not confront the witness for the government–the only other suspect in the death of her

daughter–that such error was harmless. The Court also erroneously concluded that the erroneous evidentiary rulings in their aggregate was not harmless. In so ruling, the Court applied the incorrect analysis in that the Court did not determine that the error was harmless beyond a reasonable doubt. Because of this, the Court should grant the writ and set the case down for plenary briefing and oral argument.

CONCLUSION

Petitioner's right under the Sixth Amendment to confront the witnesses against her was violated. Her right to a fair trial was undermined by not only the trial judge's ruling on this issue but also on the two other evidentiary rulings the Court below also found to be in error. The Court of Appeals's decision is infirm. This Court should grant review under Rule 10 because the lowers court's decision directly conflicts with this Court's rulings. The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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September 20, 2007

Attorney for Petitioner

APPENDIX A

65 M.J. 190

U.S. Court of Appeals for the Armed Forces.
UNITED STATES, Appellee,
v.
Ashontia K. HARROW, Airman Basic, U.S. Air Force, Appellant.

No. 06-0474.
Crim.App. No. 35257.

Argued Feb. 14, 2007.
Decided June 22, 2007.

***192** RYAN, J., delivered the opinion of the Court, in which BAKER, ERDMANN, and STUCKY, JJ., joined. EFFRON, C.J., filed an opinion concurring in part and in the result.

For Appellant: *Captain Christopher L. Ferretti* (argued); *Lieutenant Colonel Mark R. Strickland* (on brief); Captain Christopher S. Morgan.

For Appellee: *Captain Jefferson E. McBride* (argued); *Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs,* and *Captain Daniel J. Breen* (on brief); *Colonel Gary F. Spencer* and *Major Steven R. Kaufman.*

Amicus Curiae for Appellant: *Captain Alex Schneider* (law student) (argued); *James H. Rosenblatt* (supervising attorney) (on brief) for Mississippi College School of Law.

Amicus Curiae for Appellee: *Captain Jennifer J. Bowersox* (law student) (argued); *Victoria A. Lowery* (supervising

attorney) and *Katie Akins* (law student) (on brief) for Mississippi College School of Law.

Judge RYAN delivered the opinion of the Court.

Appellant argues that three evidentiary errors during her trial require this Court to overturn her conviction for the unpremeditated murder of her infant daughter. She also alleges errors arising from her guilty plea to larceny, the United States Air Force Court of Criminal Appeals' sentence reassessment, as well as from post-trial and appellate delay. We address each of these six issues. Although we conclude that this case is not without error, we hold that the errors did not prejudice Appellant. Therefore, for the reasons stated below, we affirm the decision of the lower court.

BACKGROUND

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to her plea, of the unpremeditated murder of her infant daughter, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (2000). Appellant pled guilty to violations of Articles 86, 107, 121 and 134, UCMJ, 10 U.S.C. §§ 886, 907, 921, 934 (2000), and thirteen specifications thereunder, to include: multiple failures to go, absence without leave, making a false official statement, theft of insurance proceeds, fraud in obtaining phone services, dishonorable failure to pay just debts, and making false claims to secure the approval of a loan. The sentence adjudged by the court-martial and approved by the convening authority included a dishonorable discharge, confinement for twenty-five years, and forfeiture of all pay and allowances.

The Court of Criminal Appeals affirmed all charges except one specification of absence without leave. *United States v. Harrow*, 62 M.J. 649, 661-62 (A.F.Ct.Crim.App.2006). The Court of Criminal Appeals found that Appellant's plea of guilty to the absence without leave charge was improvident and reassessed her sentence to a dishonorable *193 discharge, twenty-four years and six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

We granted review on the following issues:

I. WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM IMPEACHING THE TESTIMONY OF THE DECEASED BABY'S FATHER-THE ONLY OTHER PERSON PRESENT AT THE TIME OF THE ALLEGED SHAKING INCIDENT-WITH PRIOR INCONSISTENT STATEMENTS REGARDING THE BABY'S INTERACTIONS WITH APPELLANT AND THE BABY'S CRYING AFTER APPELLANT LEFT THE HOUSE.

II. WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN IT TOOK OVER FOUR YEARS FOR THE ARTICLE 66 REVIEW BY THE COURT BELOW TO BE COMPLETED.

III. WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VARIOUS WITNESSES REGARDING APPELLANT'S PATTERN OF MINOR PARENTAL ABUSE WHERE THE TESTIMONY CONSTITUTED INAPPROPRIATE CHARACTER EVIDENCE THAT WAS UNFAIRLY PREJUDICIAL.

IV. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE PROSECUTION'S EXPERT WITNESS TO PRESENT INADMISSIBLE PROFILE EVIDENCE THAT PLACED APPELLANT IN THE PROFILED CATEGORY AND EXCLUDED THE DECEASED BABY'S FATHER-THE ONLY OTHER SUSPECT-FROM THE PROFILED CATEGORY.

V. WHETHER APPELLANT'S GUILTY PLEAS TO CHARGE II AND ITS SPECIFICATION [LARCENY] WERE PROVIDENT.

VI. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS PROPERLY REASSESSED THE SENTENCE WHEN IT INCLUDED A REDUCTION IN PAY GRADE THAT WAS NOT ADJUDGED (OR AUTHORIZED).[1]

FACTS

A. Overview

We focus first on the general background facts relevant to Appellant's conviction for the unpremeditated murder of her infant daughter, Destiny. Destiny was taken to the hospital after suffering severe brain trauma from blunt force injury on June 23, 2000. At the hospital doctors determined that Destiny had suffered serious brain damage consistent with shaken baby syndrome and blunt force trauma. Five months later Destiny died from injuries inflicted that day. She was eleven months old.

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[1] We heard oral argument in this case at the Mississippi College School of Law, Jackson, Mississippi, as part of the Court's "Project Outreach." *See United States v. Finch*, 64 M.J. 118, 119 (C.A.A.F.2006); *United States v. Mahoney*, 58 M.J. 346, 347 n. 1 (C.A.A.F.2003).

In the course of the ensuing investigation, Appellant made contradictory and incriminating statements to investigators and others. These admissions and inconsistencies implicated her in the murder of Destiny. Direct and circumstantial evidence regarding the timing of Destiny's injury and Appellant's consciousness of guilt, as well as expert testimony, corroborated Appellant's admissions and bolstered the prosecution's case against her.

*194 The defense attempted to deflect culpability away from Appellant, arguing Antonio Jackson, Destiny's father, was the perpetrator. Some evidence showed that Appellant told investigators that Destiny's death may have been an accident. Appellant did not testify and the defense called no witnesses on the merits. All defense evidence was developed through cross-examination of the prosecution's witnesses.

The panel was asked to decide under what circumstances, and at whose hand, Destiny died. What follows is a summary of some of the evidence presented by the prosecution to prove the cause and circumstances of Destiny's death.

B. Physical Injuries to Destiny

On June 23, 2000, Destiny lived in government housing at Eglin Air Force Base, Florida, with Appellant. Jackson, the natural father of Destiny, lived out of state, but was visiting Appellant and staying at her apartment for several days.

On the day of the incident Appellant went to work and left Destiny with Jackson. Jackson was home with Destiny throughout the morning and she slept for most of that time. Appellant returned to her base apartment at midday.

Shortly after she arrived home, Appellant took off her uniform and lay on the couch. Sometime thereafter Appellant became angry with Jackson. Appellant began arguing with Jackson. The fighting escalated into Appellant screaming, yelling, and cursing.

At some point during the argument, Appellant picked Destiny up off the couch by one arm. Appellant held Destiny by one arm, allowing her to flail about, throughout her tirade. Jackson told her to be careful with the baby and not to take her anger out on Destiny. Appellant only became angrier. Appellant picked up a broom and pointed it at Jackson. She approached him, spit in his face, and continued to yell at him.

Eventually, Jackson walked away from Appellant and went into the bathroom in order to avoid the confrontation. Appellant followed him to the bathroom and continued screaming at him. Jackson left the bathroom and returned to the living room to avoid her. She followed him and began to throw things at him, including Destiny's walker.

Appellant continued to scream at Jackson, and he returned to the bathroom and locked the door. After Jackson locked himself in the bathroom, he could hear Appellant still screaming and things hitting the wall. He turned up the radio and tried to ignore her.

At 2:50 p.m. that day, after Jackson locked himself in the bathroom, and before Appellant left the apartment, Security Forces Senior Airman (SrA) Jason Warren, a patrolman assigned to Security Forces, knocked on the front door of Appellant's apartment. SrA Warren had been dispatched to Appellant's apartment to tell her to contact the first sergeant at work. This was a common occurrence, as Appellant did not have a phone.

Appellant had the baby on her hip and the baby appeared to make eye contact with SrA Warren. During the two minutes he was at the residence, SrA Warren did not hear any yelling and nothing appeared to be out of the ordinary. SrA Warren did not see Jackson. SrA Warren delivered the message and departed. Appellant left shortly thereafter, slamming the door.

After Jackson heard the door slam, he left the bathroom and found Destiny on the couch, lying on her side. He tried to give her a bottle, but she was unresponsive and would not take it. Jackson heard gargling noises coming from Destiny and other sounds. He picked her up and observed vomit where she had been laying. He held Destiny against his body and patted her on the back in an attempt to clear out any remaining emesis. As he was holding her, she began to shake, her back arched, and her eyes rolled back in her head. She then went limp.

Jackson immediately carried Destiny next door to the apartment of Mr. and Mrs. Harris to call 911 because there was no telephone in Appellant's apartment. Only a few minutes elapsed between the time Appellant sped off and the time Jackson sought assistance from Mr. and Mrs. Harris.

*195 Mr. and Mrs. Harris, Appellant's neighbors, both testified about what happened before Jackson arrived at their door. Mr. Harris was seated in the computer room of their apartment, and Mrs. Harris was in their living room, which directly abutted Appellant's living room. As the Harris' apartment shared a common but very thin wall with Appellant's apartment, they clearly heard the disturbance in Appellant's apartment.

Mr. and Mrs. Harris both heard Appellant, and only Appellant, yelling next door. Mrs. Harris heard Destiny crying

loudly for about ten minutes during the middle of the yelling. Mrs. Harris also heard a loud bang against the shared living room wall, knocking off a picture in her apartment, and then she no longer heard Destiny crying. After the thump she heard Destiny emit one or two whimpers before going silent. Five minutes after she heard the loud bang against the wall, Mrs. Harris heard Appellant's front door slam so hard that it set off Mrs. Harris' door bell. She saw Appellant get into her car to leave, spinning her tires as she exited the parking lot. Appellant looked "very angry and very raged" as she left the apartment.

Mr. Harris also heard "thumps" and Appellant "yelling" in Appellant's apartment. Mr. Harris looked out the window and saw Appellant spin her tires as she exited the parking lot. According to both Mr. and Mrs. Harris, Jackson arrived at their door with Destiny asking them to dial 911 only a minute or two after Appellant left. Responding to Jackson's plea, Mrs. Harris called 911 and requested emergency assistance for Destiny.

Police and ambulance dispatch records, and the testimony of Jackson, SrA Warren, and Mr. and Mrs. Harris, establish the following sequence of events in a thirteen-minute period from 2:45 p.m. to 2:58 p.m.: SrA Warren was dispatched to Appellant's apartment to deliver a message to her; SrA Warren arrived at Appellant's apartment and departed shortly thereafter; Appellant left the apartment; and, almost immediately thereafter, the Harrises called 911.

C. The Death of Destiny

Destiny was hospitalized as doctors attempted to save her. She had sustained serious blunt force trauma to her brain and the left side of her face and suffered significant hemorrhaging of the brain and eyes. Notwithstanding two operations and extraordinary care, Destiny died five months later.

An autopsy confirmed significant injuries to Destiny's brain. Dr. Gary D. Cumberland, a forensic pathologist and the chief medical examiner in the local Florida coroner's office, conducted an autopsy and found: bruising on the surface of the brain, tearing of the brain tissue, swelling of the brain, and several subdural and subarachnoid hemorrhages. The autopsy also revealed hemorrhages in the eyes. The autopsy did not reveal injuries associated with external trauma (e.g., skin bruises) because the injuries occurred five months before Destiny died and had already healed.

Dr. Cumberland concluded that Destiny "died as a result of blunt force injuries to the head in the situation of the shaken baby syndrome." A complete autopsy revealed no other possible cause of death. In Dr. Cumberland's opinion, after speaking with an eye specialist and a neuropathologist, the only possible cause of death was shaken baby syndrome. Dr. Cumberland found the manner of death to be homicide, as the injuries were too severe to have happened accidentally.

D. AFOSI Investigation

Special Agent (SA) Liesl D. Davenport, an Air Force Office of Special Investigations (AFOSI) investigator, participated in four interviews with Appellant. The first interview was conducted on the 28th of June by a Federal Bureau of Investigation (FBI) agent with SA Davenport sitting in.

Initially, Appellant was not a suspect because the investigators had been told that Appellant was not home at all that day. Appellant told the investigators during the first interview that she went home at lunch because she had not been feeling well. She told the investigators that she had taken some medication once she arrived at home, placed Destiny in

her crib, and that she *196 remained on the couch napping until SrA Warren came to her door. Appellant stated that Jackson was either in the kitchen or bathroom the entire time; she did not recount any fight or argument.

During this first interview Appellant stated that she had never seen Jackson handle the baby improperly. But she told the agents that she believed Jackson had accidentally shaken Destiny when she was unresponsive after he asked the Harrises to call 911. Appellant said that Mrs. Harris told her that Jackson was shaking the baby so much that Mrs. Harris had to tell Jackson to put the baby down.

When the agents attempted to verify this point in an interview with Mrs. Harris, she denied that Jackson had shaken the baby or that she had told Appellant that version of the events. Upon finding inconsistencies in Appellant's story, the agents began to view Appellant as a possible suspect.

SA Davenport conducted a second interview with Appellant with another AFOSI agent, SA Carver, on the 15th of August. SA Davenport led the interview. Because Appellant was a suspect at this point, SA Davenport advised Appellant of her Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2000) rights, which she waived.

At this interview Appellant changed her story and stated that Destiny had not been in her crib. Instead, Appellant stated that she held Destiny the entire time she was home. There was no mention of Appellant taking a nap on the couch in the second interview. Appellant stated that she may have caused Destiny's injuries accidentally when she went to the door to speak with SrA Warren. She thought she might have swung around quickly when she turned away from the door, causing Destiny's head to snap back.

At this point, the investigators knew that Jackson and Appellant had been arguing. But when SA Davenport asked Appellant about the argument she initially denied it. Eventually, Appellant admitted that she and Jackson had argued for twenty to thirty minutes during the time period in question. However, Appellant remained adamant that she had not been angry or frustrated when she left the apartment. Appellant maintained that Mrs. Harris had told her that Jackson had possibly accidentally injured the baby.

A third interview was conducted two days later. Appellant was again read her Article 31(b), UCMJ, rights, which she waived. During this interview Appellant admitted that she might have accidentally caused Destiny's injuries when she was playing with her. She described how she would regularly throw Destiny in the air and catch her, and how she thought that perhaps this caused the injuries. She again stated that the accident also might have happened when she was turning away from the door after speaking with SrA Warren. Appellant told the investigators that she tossed "it," meaning Destiny, in the air twice on that day.

Upon further questioning, Appellant asserted that only Appellant or Jackson could have injured Destiny. When asked if Jackson had injured Destiny, Appellant responded "no." According to SA Davenport, there was no additional pertinent information gleaned from the fourth interview.

E. Trial Testimony

In addition to introducing Appellant's statements to investigators, the prosecution introduced other statements made by Appellant to establish her consciousness of guilt. Jackson testified that, after the injuries to Destiny, Appellant, while crying, told him that she might be responsible. Appellant also

told Jackson that they should not talk to AFOSI or the FBI and that she thought Jackson was on "their" side and not hers.

The prosecution introduced evidence to establish Appellant's possible motives to injure Destiny. Stephanie Lewis, who was a friend of Appellant's sister, testified that Appellant had asked her, prior to Destiny's injury, if Lewis, who was separated from the father of her children, thought her "man" might come back if something happened to her children.

Appellant complained to Staff Sergeant (SSgt) Tynisha Quick, a coworker, that because of money she spent on diapers and formula for Destiny, Appellant did not have a phone, cable television, or a social life. At *197 one point, SSgt Quick observed Appellant speak directly to Destiny, blaming her for all the things she could no longer do.

SSgt Quick further testified that Appellant had told her that Destiny was more responsive to Jackson than to her. Appellant told SSgt Quick that Destiny would tremble and cry every time Appellant went near her, but would stop when Jackson was near. SSgt Quick testified that Appellant told her that she thought Jackson was trying to turn Destiny against her.

As will be discussed later when addressing Issue III, the prosecution presented several instances of Appellant's uncharged misconduct relating to Destiny. Airman First Class (A1C) Crystal E. Mills testified to an earlier incident where she saw Appellant bite Destiny after the baby had bitten her. Destiny began crying after Appellant bit her. According to A1C Mills, Appellant ignored the cries. A1C also recounted instances where Appellant would "flick" the hand of Destiny to get her to stop doing things. SSgt Quick also recounted an

incident where Appellant "thumped" or "flicked" Destiny on the thigh when she was misbehaving in a restaurant.[2]

Finally, the Government called two expert witnesses who established the cause of Destiny's death. As previously discussed, Dr. Cumberland, a forensic pathologist from the coroner's office, explained his medical findings from the autopsy. Dr. Sharon Cooper testified as an expert witness in the field of developmental and forensic pediatrics. The defense did not object to her credentials, and Dr. Cooper was recognized by the court as an expert in her field.

Dr. Cooper stated that children under one year old were the most likely victims of fatal child abuse. She testified that there is a high degree of recidivism in child abuse, and specifically in shaken baby cases, meaning that an abuser will continue to shake a baby over a period of time. Usually, the shaking becomes more intense in each instance. Dr. Cooper also testified that the most common perpetrators of this type of abuse are parents.

Dr. Cooper then explained the specific medical findings consistent with shaken baby syndrome. She stated that retinal hemorrhaging, brain injury, and bone trauma are the three most common symptoms. After going through the symptoms, Dr. Cooper explained the common triggers that would cause a person to shake a baby. According to Dr. Cooper, the most common cause is persistent crying. She stated that a person would have to shake a baby for about twenty seconds to inflict serious damage.

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[2] Trial counsel agreed at a motion hearing to exclude evidence from Destiny's autopsy that revealed evidence of previous severe head trauma.

Dr. Cooper testified that she reviewed the medical, investigative and social work records associated with this case. She also interviewed Destiny's primary care physician and her foster mother. She observed all of the witnesses called during the trial as well. After going over all of the evidence, Dr. Cooper opined that Destiny died of an inflicted injury, specifically, of shaken baby syndrome combined with blunt force trauma. She specifically noted that Destiny's patient records from her initial treatment stated that Destiny exhibited swelling of the scalp and bruising on the side of the face. This bruising and swelling was consistent with external blunt force trauma, such as a baby would experience after being thrown against a wall.

Dr. Cooper also explained the standard progression of symptoms in a shaken baby case. It usually takes fifteen minutes after the shaking has occurred for any symptoms to appear. The symptoms manifest themselves in a change in mental status or an abnormal cry. The abnormal cry stems from an altered neural state, which causes breathing difficulty. Jackson described this type of noise during his testimony.

The victim then becomes less responsive and less active. Next, a victim will vomit. The vomit will not be normal, because the child has lost neural functioning to the point where the stomach is no longer digesting food. Finally, the baby will arch her back, roll her eyes back in her head, and become *198 stiff. This is a classic tonic seizure, associated with abnormal electrical activity in the brain. Dr. Cooper stated that a baby's eyes could be open after the trauma, but they would not be able to track anything visually. All of Destiny's symptoms, as recounted by Jackson, were consistent with shaken baby syndrome.

Dr. Cooper testified that it was unlikely that anything else caused Destiny's symptoms. She also stated that the act of patting the child on the back to try to dislodge vomit would not cause the symptoms Destiny experienced. Running with an infant in a person's arms or tossing a baby in the air and catching her would not cause this type of injury either.

The Government rested at the conclusion of Dr. Cooper's testimony. After the presentation of the prosecution's case, Appellant rested. In closing, the prosecution argued that the evidence rebutted Appellant's prior claim of an accidental injury to Destiny and identified Appellant as the perpetrator of the murder of Destiny. Appellant's argument revolved around a single point-that the members could not "exclude Mr. Jackson as a potential perpetrator of the offense." After three hours of deliberations, the panel returned a verdict finding Appellant guilty of the unpremeditated murder of Destiny.

DISCUSSION

A. Appellant's Opportunity to Impeach Jackson

1. Appellant alleges the military judge erred under Military Rule of Evidence (M.R.E.) 613 when he denied the defense request to recall SA Davenport to establish alleged inconsistencies between Jackson's testimony at trial and a statement he made to SA Davenport during the investigation. The purported inconsistency related to Destiny's circumstances when Appellant left her apartment. At trial Jackson testified that Destiny was limp and non-responsive when Appellant left. Defense counsel asserted that Jackson's August 15 statement to SA Davenport stated that Destiny was crying after Appellant left.

During cross-examination, defense counsel referenced Jackson's prior statements to investigators and the investigators' notes to establish that Jackson had changed certain aspects of his story between statements, embellished his trial testimony by including details that he had omitted from his prior statements, and presented trial testimony that was different in some respects from his prior statements. For example, the defense had Jackson admit that he initially lied to the FBI about whether he and Appellant were in a fight, and that a prior statement made no reference to Appellant spitting on him or Appellant speeding away from the apartment.

With respect to other questions about the substance of the five prior statements Jackson made during the course of the investigations, defense counsel attempted to refresh Jackson's recollection as to what he had said in these prior statements. Jackson repeatedly responded that he either did not remember a fact or did not remember what he had said in his statements. While the trial counsel stated that the prosecution would not object if the defense wanted to admit Jackson's August 15th statement to investigators, defense counsel declined the invitation.

After the Government concluded its case, defense counsel sought to recall SA Davenport pursuant to M.R.E. 613(b) in order to prove inconsistencies in Jackson's testimony with extrinsic evidence. Specifically, defense counsel explained to the military judge during an Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2000), session that he expected SA Davenport to testify that Jackson told her during the investigation that Destiny was crying after Appellant left the house. The defense counsel argued that the testimony of SA Davenport was extrinsic evidence that contradicted testimony Jackson gave at trial.

The military judge did not allow defense counsel to call SA Davenport. The military judge ruled that the statements were not inconsistent because Jackson had simply stated that he did not remember when he was asked about whether Destiny was crying. The military judge opined that there is *199 only an inconsistent statement when the witness denies making the statement, and Jackson had merely stated that he did not remember and did not have any recollection of Destiny crying after Appellant left.

In his ruling, the military judge cited M.R.E. 608 rather than the appropriate rule of evidence, M.R.E. 613. While the military judge referred to M.R.E. 608, the explanation of the ruling focused on whether the evidence could be admitted as a prior inconsistent statement. Although the record is less than clear, the military judge appears to have determined that the evidence could not be brought in under M.R.E. 613. Moreover, the military judge instructed the members on prior inconsistent statements with regard to Jackson's testimony during final instructions on the merits.

Defense counsel and counsel for the Government agreed that the extrinsic evidence was for impeachment, rather than for substantive purposes. We note that defense counsel attached SA Davenport's AFOSI notes from the August interview with Jackson as an appellate exhibit and offer of proof and expressly chose not to attach Jackson's statements as appellate exhibits. The notes support Appellant's assertion that Jackson told the agent that Destiny was crying after Appellant left the apartment.

2. [1] The process of impeachment by prior inconsistent statement is a tool to attack the credibility and/or recollection of a witness. "By showing self-contradiction, the witness can be discredited as a person capable of error." *United States v.*

Banker, 15 M.J. 207, 210 (C.M.A.1983); 3A John H. Wigmore, *Evidence* § 874 (Chadbourne rev.1970). M.R.E. 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same...." If the inconsistency is admitted, extrinsic evidence is generally not admissible. *United States v. Gibson,* 39 M.J. 319, 324 (C.M.A.1994) (holding that " 'the more expedient practice' is to disallow extrinsic evidence of a prior inconsistent statement if the witness admits making the statement") (citations omitted). If the inconsistency is not admitted, or the witness equivocates, extrinsic evidence may be admitted, but only for impeachment. *United States v. Damatta-Olivera,* 37 M.J. 474, 478 (C.M.A.1993) ("whether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position").

[2][3][4] A decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.* In this case, the military judge erred when he apparently determined that a failure to remember facts contained in a prior statement *cannot* be inconsistent with in-court testimony that differs from those facts.[3] This Court, in *Damatta-Olivera,* 37 M.J. at 478 and

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[3] In contrast, the military judge did not err with respect to defense counsel's effort to impeach Jackson regarding Appellant's interaction at the apartment with Destiny on June 23. Defense counsel asserted that Jackson's prior statement to AFOSI stated that Appellant was lying on the couch playing with Destiny. The military judge found that Jackson was not asked about this during his testimony, that there was no inconsistency, and that the defense had not established a foundation for later impeachment. The record supports the military judge's findings, and this is a correct statement of the law. *See United States v. Hale,* 422 U.S. 171, 176, 95 S.Ct. 2133, 45

United States v. Meghdadi, 60 M.J. 438, 444 (C.A.A.F.2005), has noted that an inconsistency, for purposes of M.R.E. 613, *200 may be found "not only in diametrically opposed answers," but also in "inability to recall," *Damatta-Olivera,* 37 M.J. at 478, or equivocation. *Meghdadi,* 60 M.J. at 444.

[5] A military judge has considerable discretion to determine if the trial testimony is inconsistent with a prior statement. *Damatta-Olivera,* 37 M.J. at 478; *see also United States v. Insana,* 423 F.2d 1165, 1170 (2d Cir.1970). But here the military judge appears not to have understood that an inability to recall or a "non-responsive" answer *may* present an inconsistency for purposes of M.R.E. 613. Consequently, his evidentiary ruling, based on an incorrect understanding of the law, was an abuse of discretion. *United States v. Roberts,* 59 M.J. 323, 326 (C.A.A.F.2004) ("A military judge abuses his discretion when ... he is incorrect about the applicable law, or when he improperly applies the law.").

[6][7] Applying nonconstitutional harmless error analysis, we conduct a de novo review to determine whether this error had a substantial influence on the members' verdict

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L.Ed.2d 99 (1975) (citation omitted) (reasoning that "[a]s a preliminary matter ... the court must be persuaded that the [prior] statements are indeed inconsistent [with trial testimony]."). The military judge did not abuse his discretion in rejecting the defense attempt, under the guise of impeachment, to bring in "new evidence" that related to a point that Jackson had not testified to at trial. *See Damatta-Olivera,* 37 M.J. at 478 (stating that "[t]he military judge has considerable discretion to determine if trial testimony is inconsistent.").

Similarly, we see no basis for Appellant's assertion of error with respect to an alleged third inconsistency regarding whether Appellant threw anything at Jackson during their argument. Defense counsel did not raise an inconsistency between Jackson's testimony and a prior statement with respect to this matter at trial.

in the context of the entire case. *See Kotteakos v. United States,* 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F.2005). We consider four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Berry*, 61 M.J. at 98. When a "fact was already obvious from ... testimony at trial" and the evidence in question "would not have provided any new ammunition," an error is likely to be harmless. *United States v. Cano,* 61 M.J. 74, 77-78 (C.A.A.F.2005); *see also United States v. Santos*, 59 M.J. 317, 322 (C.A.A.F.2004).

[8] As outlined above, and as articulated by the lower court, the Government presented a convincing case against Appellant. The evidence shows that Appellant was in a rage, that she was alone with the victim, that she admitted to investigators that only she and Jackson were possible suspects, that she did not believe Jackson injured the baby, that she was untruthful on numerous occasions, and that the timeline and quality of the injuries amply supported the Government's version of the facts. We also note that Dr. Cooper's medical testimony regarding the standard progression of shaken baby syndrome was both unrebutted and consistent with the description of Destiny's symptoms. Further, the timeline established by the Government's witnesses, alone or in combination with Appellant's pretrial statements regarding Jackson's location when she left the apartment, make Jackson an unlikely suspect.

The defense's case consisted of cross-examination of the Government's witnesses in an attempt to show that it was possible that Jackson, rather than Appellant, could have committed the crime. The defense's case was exceptionally weak in light of Appellant's statements that Jackson was in the

bathroom when she left and that she did not believe he injured Destiny, as well as the evidence of Appellant's admissions, consciousness of guilt, and her rage at the time of Destiny's injuries. Finally, there was no credible refutation of the Government timeline, which was persuasive evidence that Destiny's injuries were sustained while Jackson was locked in the bathroom, given the few minutes that passed between when Appellant left the apartment and when the 911 call was placed.

The materiality of the excluded extrinsic evidence of prior inconsistent statements must be viewed with an eye to its permissible purpose, which was for impeachment only. The defense never sought to seek the admission of any of Jackson's statements, which presumably contained the same inconsistency noted in the investigator's notes, for use as substantive evidence under M.R.E. 801(d)(1)(A) or any other evidentiary rule.

As the lower court articulated and the record reveals, defense counsel effectively impeached Jackson with respect to the prior inconsistent statements by intrinsic evidence. *Harrow*, 62 M.J. at 656-57. While defense counsel did not move to admit Jackson's August 15 statement, he repeatedly referred to it and Jackson's other statements to investigators in his cross-examination of Jackson. *201 Defense counsel cross-examined Jackson at length regarding his lie to the FBI, changes in his story between statements, his inability to remember even after having the opportunity to review his prior statements, his embellishment of his trial testimony beyond what he relayed to investigators, and the fact that his memory must have been better when the statements were given. And we agree with the lower court that "defense counsel used this impeachment extensively and effectively in his closing argument." *Id.* at 657.

[9] Furthermore, the military judge gave an instruction regarding inconsistent statements, reiterating the point that Jackson's credibility was at issue. Members are presumed to follow the military judge's instructions, *United States v. Taylor,* 53 M.J. 195, 198 (C.A.A.F.2000), and we have no basis for concluding that they did not in this case.

The combination of cross-examination and argument by the defense counsel impeached Jackson's credibility and ability to recall. The addition of the AFOSI agent's testimony would have been cumulative, and would not have changed the arguments proffered by defense counsel to the members. Nor would it have had a substantial influence on the members' verdict. *See Santos,* 59 M.J. at 322 (reasoning cumulative evidence was of little probative value); *see also United States v. Mitchell,* 113 F.3d 1528, 1532 (10th Cir.1997) (finding failure to admit extrinsic evidence of witness's prior inconsistent statement harmless where defense counsel asked her whether she had made the statement; although she testified she did not remember making the statement, the jury was aware of the attack on her credibility). Under the facts of this case, we cannot say that a thorough impeachment of Jackson's credibility and recollection was not completed even absent the extrinsic evidence.

In light of all of the above factors, and given the purpose for which M.R.E. 613 evidence may by used, the error was harmless in this case.

B. M.R.E. 404(b) Evidence

1. Defense counsel moved in limine for several pieces of evidence proffered by trial counsel to be excluded. The evidence at issue was:

1) SSgt Quick's testimony that Appellant thumped the baby hard enough to make the baby scream.

2) A1C Mills' testimony that Appellant flicked Destiny on the body to punish her if Destiny reached for something.

3) Nina Harris' testimony that she observed Appellant call Destiny stupid and ugly, pull at Destiny by jerking her arm, and grab her by the cheeks and pinched them hard when she disobeyed.

4) Sharon Rogers' and Deborah Gardner's testimony that they witnessed Appellant brushing the baby's hair vigorously and without care, and Mrs. Gardner's testimony that she did so for six hours straight after the baby's brain surgery. This occurred at the hospital after Destiny had been shaken.

5) Nina Harris' testimony that on one occasion Appellant left Destiny at the Harris' without food or diapers, then turned off her cell phone and did not return that night.

The military judge ruled that the first three pieces of testimony were admissible, but the last two were not.

In his ruling, the military judge determined that under M.R.E. 404(b) the first three pieces of evidence tended to prove a pattern of abuse, as well as intent. When the members were properly instructed on the use of the M.R.E. 404(b) evidence, however, they were instructed that it could only be used to show Appellant's intent or absence of accident. Appellant contends that none of this evidence should have been admitted and that it prejudiced her.

2. A decision to admit evidence is reviewed for abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F.2003). In this case, the military judge applied the correct test for the admissibility of uncharged misconduct under M.R.E. 404(b). *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A.1989). This Court recently summarized*202 the analysis under *Reynolds:* First, does the evidence reasonably support a finding by the court members that Appellant committed prior crimes, wrongs or acts? Second, what "fact ... of consequence" is made "more" or "less probable" by the existence of this evidence? And last, is the "probative value ... substantially outweighed by the danger of unfair prejudice?" *United States v. Barnett,* 63 M.J. 388, 394 (C.A.A.F.2006) (citations omitted).

[10] The uncontroverted testimony describing each incident of uncharged misconduct reasonably supports a finding by the court members that Appellant did commit each of these alleged prior acts.

We next address whether any of this evidence makes a fact of consequence more or less probable. We begin by noting that murder is a specific intent crime. This offense permits conviction of lesser included offenses stemming from Destiny's death in the absence of specific intent to kill-including but not limited to involuntary manslaughter, assault consummated by a battery and negligent homicide. *Manual for Courts-Martial, United States* pt. IV, para. 45.d. (2005 ed.) (*MCM*). While the defense did not argue accident, evidence produced at trial, through Appellant's statements to investigators, supported an argument that the injuries might have been accidentally inflicted. The prosecution was entitled to present evidence to rebut such an argument.

3. Appellant argues that intent evidence is never admissible unless a defendant specifically defends on the ground of either lack of the requisite intent or accident. The Supreme Court, examining this same question, unequivocally determined that evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution. *Estelle v. McGuire,* 502 U.S. 62, 69, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (citing *Mathews v. United States,* 485 U.S. 58, 64-65, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)).

This Court has dealt inconclusively with the holding of *Estelle* in prior cases on the ground that *Estelle* involved a state rule of evidence. *Compare United States v. Diaz,* 59 M.J. 79, 95 n. 3 (C.A.A.F.2003) (distinguishing *Estelle*), and *United States v. Morrison,* 52 M.J. 117, 122-23 (C.A.A.F.1999) (not citing, but implicitly rejecting *Estelle*), *with United States v. Whitner,* 51 M.J. 457, 461 (C.A.A.F.1999), and *United States v. Sweeney,* 48 M.J. 117, 120 (C.A.A.F.1998) (embracing the notion that the prosecution must prove every element).

This Court's intermittent efforts to distinguish *Estelle* as a Supreme Court case addressing state, rather than federal, law does not detract from the force of the basic tenet asserted by the Supreme Court: "A simple plea of not guilty ... puts the prosecution to its proof as to all elements of the crime charged...." *Mathews,* 485 U.S. at 64-65, 108 S.Ct. 883 (1988) (reviewing a federal bribery conviction); *see also Old Chief v. United States,* 519 U.S. 172, 199, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (reviewing a federal firearm possession conviction).

4. But the question remains whether the relatively minor acts admitted in this case under M.R.E. 404(b) in fact make intent to kill or absence of accident more likely than not, and, if not, whether Appellant was prejudiced by their admission.

We agree that the relevance of these minor acts to the intent to kill is tenuous, at best. But we need not resolve the issue of error where, as here, the question of prejudice is easily decided. *United States v. Hall*, 56 M.J. 432, 437 (C.A.A.F.2002); *United States v. Nickoson*, 15 C.M.A. 340, 344, 35 C.M.R. 312, 316 (1965).

We conclude that the admission of the acts under M.R.E. 404(b) did not prejudice Appellant. The Government adduced evidence at trial that Appellant shook Destiny with great force for at least twenty seconds and either threw her against a wall or used other force sufficient to result in serious blunt force trauma to Destiny's brain and the left side of her face, including significant hemorrhaging of the brain and eyes and, ultimately, death. In the context of the entire case, we are *203 convinced that acts of "flicking," "pinching," or "thumping" are minor acts that did not have a substantial influence on the members' verdict in this case. Indeed, in his argument on findings, the trial counsel did not even mention any of the uncharged misconduct.

For the reasons stated above-the weight of the remaining evidence, combined with the weakness of the defense's case-we conclude that any error stemming from the admission of this evidence did not substantially prejudice Appellant. *See Barnett*, 63 M.J. at 397 (holding that when the government presents a strong case, the defense presents a weak case, and the erroneously admitted M.R.E. 404(b) evidence was "of marginal importance given the difference in contexts" between the specifications and the incidents recounted in the erroneously admitted evidence, the error was harmless); *United States v. Baumann*, 54 M.J. 100, 105 (C.A.A.F.2000) (reasoning that when the "prosecution presented an overwhelming case," the appellant's defense was "extremely weak," and the military judge properly instructed on the use of

M.R.E. 404(b) evidence, the error was harmless); *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F.1999) (holding that when the remainder of the Government's case was strong and the defense presented no evidence to contradict it, instead relying "on suggestion and insinuation," the M.R.E. 404(b) error was harmless); *United States v. Corbett,* 29 M.J. 253, 256 (C.M.A.1989) (determining that inadmissible M.R.E. 404(b) evidence had a minimal effect on the members, considering all the other evidence presented at trial, the weakness of appellant's own testimony on the merits, and the inadmissible evidence's tenuous relevance); *see also United States v. Davis,* 657 F.2d 637, 640 (4th Cir.1981) (holding that erroneous admission of M.R.E. 404(b) evidence was harmless when the remaining evidence conclusively implicated the appellant); *United States v. Ezzell,* 644 F.2d 1304, 1306 (9th Cir.1981) (holding that where evidence of guilt is overwhelming, M.R.E. 404(b) error was harmless).

C. Profile Evidence

Dr. Cooper testified as an expert witness in the fields of developmental and forensic psychiatry. She testified about child abuse and shaken baby syndrome in general and her specific findings in this case. The defense did not challenge her methodology or the relevance or reliability of her testimony. The defense counsel did raise the issue of impermissible profile evidence and reiterated their understanding that the Government did not intend to offer such evidence. The Government agreed.

Appellant challenges the following particulars of Dr. Cooper's testimony as impermissible profile evidence. First, that the most common person to fatally abuse a child is a biological parent. Defense counsel objected to this testimony, but it was allowed by the military judge. Second, that the most

common trigger for baby shakings is persistent crying, which the defense did not object to at trial. Finally, Dr. Cooper's testimony about the symptoms and progression of shaken baby syndrome and her medical conclusion that Destiny's primary diagnosis was probably most consistent with an inflicted injury, as opposed to an accidental injury. Defense counsel objected, and the military judge overruled the objection.

Dr. Cooper did not offer an opinion as to which parent abused the child in this case. Appellant argues that all of the testimony above constituted impermissible profile evidence that placed Appellant in the profiled category and excluded Destiny's father from the profiled category.

[11] Profile evidence is evidence that presents a characteristic profile or trait of an offender, and then places the accused's personal characteristic or trait within that profile as proof of guilt. *United States v. Rynning*, 47 M.J. 420, 422 (C.A.A.F.1998). In *United States v. Banks,* this Court held that "generally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." 36 M.J. 150, 161 (C.M.A.1992). Such evidence is improper because it treads too closely to character evidence offered to show that an accused acted in conformity with that character and committed the act in question, evidence prohibited under M.R.E. 404(b). *See Banks,* 36 M.J. at 161.

***204** This Court recognizes that characteristic evidence of the abuser is distinguishable from evidence that focuses on the characteristics of a battered child. *United States v. Traum,* 60 M.J. 226, 235 (C.A.A.F.2004). Moreover, evidence of the characteristics of a child abuser is further distinguishable from evidence about the symptoms and progression of shaken baby syndrome. This is true even if that medical testimony, tied to

other facts adduced at trial, makes it more likely that an accused is the one guilty of the charged offense.

[12][13] We agree with Appellant that two of Dr. Cooper's statements were inadmissible profile evidence. The statements that the most common person to fatally abuse a child is a biological parent, and the statement that the most common trigger for baby shakings is persistent crying, are focused on characteristics of the abuser, as opposed to characteristics of the child. *Id.* at 234-35. But the other evidence complained of-symptoms and progression of shaken baby syndrome-is not profile evidence.

Of course, Dr. Cooper's statements relating to profile evidence pertained equally to both parents-Appellant and Jackson were both Destiny's biological parents, and Destiny's persistent crying was heard by both of them on the day she sustained her fatal injuries.

[14] None of the profile evidence placed Appellant in the profiled category and exclude Destiny's father from the profiled category. Rather, it placed them both squarely within the profiled category. Given that the case focused on which parent was responsible for the injury, and that the profile evidence applied equally to each of them, we fail to see the prejudice. Consequently, any error in admitting this evidence was harmless.[4]

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[4] As the defense did not object at trial when Dr. Cooper testified that the most common trigger for baby shakings is persistent crying, we normally would review such errors under a plain error analysis. *United States v. Powell*, 49 M.J. 460 (C.A.A.F.1998). We need not undertake a separate plain error analysis in this case, as the issue can be resolved, along with the evidence Appellant did object to, by determining whether any error unduly prejudiced Appellant.

Appellant does not argue that evidence regarding the progression and symptoms of shaken baby syndrome are either inadmissible expert testimony or profile evidence per se. Rather, the argument is that such testimony, described as a "modified profile of Destiny's child abuse," constituted impermissible profile evidence in this case because the testimony lined up with other facts adduced at trial in a manner that allowed the Government to argue that it was Appellant, rather than Jackson, who committed the offense of unpremeditated murder. We reject Appellant's argument.

First, the evidence regarding the progressions and symptoms of shaken baby syndrome focuses on the characteristics of the child, and fits squarely within *Traum.* Second, we are aware of no authority that suggests that otherwise admissible expert testimony regarding the symptoms and progression of a medical syndrome can be transformed into profile evidence because the timing of the symptoms supports an argument that it was the accused that committed the offense.

Evidence is not profile evidence simply because it tends to incriminate an accused. The prohibition against profile evidence does not prohibit otherwise admissible expert evidence, simply because other facts tie the testimony to a conclusion that an appellant was the one in the best position to have committed the charged act.

D. Improvident Guilty Plea

Appellant contends her guilty plea to the larceny charge stemming from her fraudulent insurance claim was improvident. During the providency inquiry Appellant admitted that she fraudulently made a claim to her insurance carrier so that the carrier would pay for damage done to another airman's car. Appellant was not driving the car covered by her insurance

carrier when she collided with the other airman's vehicle. In fact, the accident occurred before Appellant had the insurance upon which she made the claim. Appellant did not tell the insurance company either of these facts and intended that they pay the claim. As a result of Appellant's *205 misrepresentations, the insurance carrier paid the other airman for damage Appellant did to his car in the accident.

[15][16] This Court rejects a guilty plea only where the record shows a substantial basis in law and fact for questioning a plea. *United States v. Roderick*, 62 M.J. 425, 428 (C.A.A.F.2006). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F.2006). This Court permits the military judge "in a borderline case ... [to] give weight to the defense evaluation of the evidence." *United States v. McCrimmon*, 60 M.J. 145, 152 (C.A.A.F.2004) (citing *United States v. Clark*, 28 M.J. 401, 407 (C.M.A.1989)).

Appellant does not question that the military judge properly stated the elements of the offense of a wrongful-obtaining larceny. Nor does Appellant contend that Superior Insurance Company had any obligation to pay a claim on an uncovered car for an accident that took place outside of the coverage period. Appellant nonetheless questions the factual sufficiency of the providency inquiry.

[17] A guilty plea is provident if the facts elicited make out each element of the charged offense. *See United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F.1996) (concluding that the providence inquiry adequately established a factual basis supporting each of those elements); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A.1980) (holding that a plea of guilty is provident where the factual circumstances as

revealed by the accused himself objectively support the alleged elements of the offense).

[18] In this case, the providence inquiry established that insurance money in the amount of $729.65 was "wrongfully obtained" from Superior Insurance for the use of Airman (Amn) Hill, with the intent to defraud Superior Insurance of the use and benefit of the money. *See United States v. Riddle,* 44 M.J. 282, 287 (C.A.A.F.1996) (establishing larceny for intent to steal pay entitlements to which appellant did not believe he was entitled). Appellant had no entitlement to insurance for an accident prior to her coverage period, as she acknowledged. As the providence inquiry shows, Appellant designated Amn Hill to be the recipient of the Superior Insurance payment. Appellant stated that she intended Superior Insurance to pay the money and that she "learned that Superior Insurance paid" Amn Hill.

A similar scenario is described in the *MCM* explanation of the offense of an obtaining type larceny: if a person "obtained the delivery of another's goods to a person or place designated by the accused," the accused is guilty of larceny if the other elements of the offense are proven. *MCM* pt. IV, para. 46.c.(1)(b). We reject Appellant's suggestion that the military judge's failure to elicit how Appellant "knew it was her representation that deceived the insurance company," or "why her misrepresentation was an important factor in the insurance company's decision to pay," or "when the $729.65 was paid by the insurance company to Airman Hill," alone or together, create any basis, let alone a substantial basis, in law or fact for questioning the sufficiency of the plea to this offense. *See United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F.1996) (declining to speculate post-trial on factual matters that might have been contested at trial in the context of examining whether a guilty plea was provident).

We similarly reject Appellant's argument that the motive for committing this offense-that Appellant knew she was supposed to pay Amn Hill for the damage to her car-sets up a matter inconsistent with her plea. *See, e.g., MCM* pt. IV, para. 46.f.(iii)(A) (recognizing that the relevant inquiry is whether the accused had the requisite intent). Appellant's suggestion that her motive in wrongfully obtaining the insurance money somehow places the facts of this case within the framework of a "debt or the amount thereof is not the proper subject of a larceny," *United States v. Mervine,* 26 M.J. 482, 483-84 (C.M.A.1988), is without merit.

E. Unauthorized Reduction in Pay Grade

At trial, Appellant pled guilty to being absent without leave for four days. The Court of Criminal Appeals held that her plea ***206** on this charge was improvident. *Harrow,* 62 M.J. at 662. After determining the plea was improvident the Court of Criminal Appeals reassessed Appellant's sentence to a dishonorable discharge, twenty-four years and six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Because no reduction to E-1 was adjudged at trial, Appellant argues that this was an unlawful increase in her sentence.

[19][20] We review a sentence reassessment by a Court of Criminal Appeals for obvious miscarriages of justice or abuses of discretion. *United States v. Buber*, 62 M.J. 476, 478 (C.A.A.F.2006). The Government concedes that it was error to reassess the sentence to include a reduction to E-1 when such reduction was not adjudged at trial. At trial, Appellant was already an E-1.

This abuse of discretion appears, however, to be an error without any practical import, let alone, any prejudice. And

Appellant identifies none. This is not surprising. No logic suggests that the Court of Criminal Appeals would have *decreased* some other portion of the sentence assessment if it understood that another portion of the sentence, the reduction in rank, was not available to it.

Thus, while we agree that the lower court abused its discretion in assessing a reduction to E-1 that was not adjudged at trial, where Appellant was already an E-1, it is an increase in punishment only in the most technical of senses, since the reduction was void ab initio, and a nullity. We decline to remand the case for a sentence reassessment under these particular facts, for correction of an error that has not had, and never could have, any negative effect upon Appellant. Rather, we set aside that portion of the Court of Criminal Appeals decision purporting to affirm reduction to E-1.

F. Post-trial and Appellate Delay

The final issue is whether Appellant was deprived of her right to due process by the 1,467 days that elapsed between her trial and completion of appellate review. Of that delay, 826 days was time between when the final briefs were submitted to the Court of Criminal Appeals and the issuance of its decision. Appellant contends she was prejudiced because, due to the appellate delay, her lead appellate counsel was unable to argue her case.

[21] In this case, the overall delay of 1,467 days between the trial and completion of review at the Court of Criminal Appeals is facially unreasonable. Because we conclude that the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972):(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely

review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F.2006). We need not engage in a separate analysis of each factor where we can assume error and proceed directly to the conclusion that any error was harmless beyond a reasonable doubt. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F.2006). This approach is appropriate in Appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of Appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

CONCLUSION

In evaluating Appellant's assignments of error we have considered not only the impact of each individual error, but also any cumulative prejudice that could have arisen from a combination or errors. *See Banks*, 36 M.J. at 170-71. We conclude that neither individually nor in combination was Appellant prejudiced by the errors in this case. The decision of the United States Air Force Court of Criminal Appeals, except for that portion purporting to affirm a reduction to E-1, is affirmed.

EFFRON, Chief Judge (concurring in part and in the result):

I concur in the majority opinion, subject to the following with respect to Issues I and III: While I have reservations both as to the ***207** adequacy of the opportunity to impeach Antonio Jackson and as to the admissibility of Appellant's prior acts of misconduct, I agree with the majority that any errors in regard to those matters were harmless in view of Appellant's pretrial statements and the other evidence in the case.

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APPENDIX B

62 M.J. 649

U.S. Air Force Court of Criminal Appeals,
UNITED STATES
v.
Airman Basic Ashontia K. HARROW,
United States Air Force.

ACM 35257.

Sentence Adjudged 25 Jan. 2002.
Decided 31 Jan. 2006.

***651** Appellate Counsel for Appellant: Captain Christopher S. Morgan (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Captain C. Taylor Smith (argued), Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before STONE, Senior Judge, GENT, and SMITH, Appellate Military Judges.

OPINION OF THE COURT

STONE, Senior Judge.

A panel of officer and enlisted members convicted the appellant, contrary to her pleas, of the unpremeditated murder of her daughter, in violation of Article 118, UCMJ; 10 U.S.C. § 918. She pled guilty to 13 additional offenses, to include:

multiple failures to go, absence without leave, making a false official statement, theft of insurance proceeds, fraud in obtaining phone services, dishonorable failure to pay just debts, and making false claims to secure the approval of a loan. These offenses violated Articles 86, 107, 121, and 134, UCMJ, 10 U.S.C. §§ 886, 907, 921, 934. The court members' adjudged sentence included a dishonorable discharge, confinement for 25 years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

The appellant assigns eight errors: (1) Whether the record of trial is incomplete and not substantially verbatim; (2) Whether the military judge erred in not admitting extrinsic evidence of a prior inconsistent statement to impeach a key government witness; (3) Whether the evidence is legally and factually sufficient to support the appellant's murder conviction; (4) Whether the military judge erred in admitting expert testimony; (5) Whether the military judge erred in admitting uncharged misconduct evidence; (6) Whether one of the government's expert witnesses abandoned her neutral role and provided a biased and unreliable opinion based upon insufficient facts or data; (7) Whether the appellant's pleas of guilty to three offenses were provident; and (8) Whether the appellant received ineffective assistance of counsel.[1]

Having carefully reviewed the record of trial, the written submissions of the parties, ***652** and the excellent oral arguments of counsel,[2] we hold that the appellant's guilty pleas

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[1] This last issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982).

[2] As part of this Court's Project Outreach Program, we held oral argument on Issues (1) and (2) at the Air War College, Maxwell Air Force Base, Alabama.

to one of the specifications was improvident, and therefore set aside and dismiss that finding and reassess the sentence. The remaining assignments of error are without merit. We discuss most of them below.

FACTUAL BACKGROUND

This case involves the death of Destiny Harrow, the appellant's five-month-old daughter. Expert testimony established that Destiny died as the result of abusive head trauma, more commonly referred to as shaken baby syndrome. She sustained blunt force trauma to her brain and the left side of her face on the morning of 23 June 2000, and suffered significant hemorrhaging of the brain and eyes. She died approximately five months later. At trial, the cause of death was uncontested. The central evidentiary issue was whether the injuries were caused by the appellant or by Destiny's biological father, Antonio Jackson.

Prior to her death, Destiny lived in government housing on Eglin Air Force Base, Florida, with the appellant. Mr. Jackson, who lived out of state, was visiting the appellant for a few days and staying in her on-base apartment. On the morning of 23 June 2000, the appellant went to work, leaving Destiny with Mr. Jackson. Between 1045 and 1130 hours, the appellant came home for lunch. She departed at approximately 1455 hours. Although the record does not address everything that happened during this period, certain events are clearly established.

The appellant's next-door neighbors, Mr. and Mrs. Harris, testified about what they saw and heard that day. Mrs. Harris testified that the morning was quiet. In the afternoon she heard the appellant "yelling and arguing, loud screaming, cursing, [and] very bad language" for about 30 to 45 minutes. Mrs.

Harris did not hear Mr. Jackson at all, but heard Destiny crying for about 10 minutes, and then heard a "loud, hard bang" against the wall adjoining their two apartments. She testified, "My picture fell off. And I didn't hear [Destiny] cry anymore. I heard her whimper twice and that was it."

About five minutes after hearing the bang against her wall, Mrs. Harris saw the appellant leave the apartment and drive off. Mrs. Harris described the appellant's face as "very angry and very raged," and she testified the appellant slammed the front door so hard the Harris doorbell rang. She said the appellant went to her car, slammed the door, and "drove away real fast. She spun her tires out [so] that you could hear the gravel hit the sidewalk." Mr. Jackson came over to her apartment "within a minute" after the appellant's departure, in great distress, holding Destiny and asking for assistance.

Mr. Harris provided similar testimony. He noted that their apartments were very small and had extremely thin walls. He said he also heard "thumps" and the appellant "yelling" for about 30 minutes. He then heard a door slam and saw the appellant "spin out" of the driveway in her car. A "short time" later, he testified, Mr. Jackson came over with Destiny and asked him to call an ambulance. Mr. Jackson could not call 911 from the appellant's apartment because she did not have a telephone.

Mr. Jackson also testified about the events of that day. He said the appellant rested on the couch for a period of time. At one point, he went to the bathroom to shave. He testified the appellant began "fussing," "arguing," "spitting," "yelling," and "screaming" at him. In order to avoid a confrontation, he moved into the living room, where Destiny was sitting on the couch. The appellant grabbed Destiny off of the couch and held her by the arm as she walked around the room. She held

Destiny this way throughout the argument. When Mr. Jackson told the appellant not to take her anger out on Destiny, the appellant told him, "No, this is my baby. I do what I want with my baby." To avoid further angering the appellant, he testified he then returned to the bathroom, locked the door, turned up the radio, and sat down on the toilet seat. He could still hear the appellant "screaming," things hitting the walls, and doors slamming. He also remembered hearing a knock on the door. When it was ***653** quiet, he left the bathroom and walked to the front door and saw the appellant pulling out of the driveway and speeding off.

Mr. Jackson then turned from the front door and saw Destiny lying quietly on the couch. He found Destiny's bottle and laid it in her hand. As he headed back to the bathroom to finish shaving, he said he almost immediately heard a "gargling" noise coming from Destiny. He went over to her and saw she had a thick, pasty vomit coming out of her mouth. He picked her up, turned her over, patted her on the back and saw additional vomit coming out of her mouth. At this point, he testified, she started shaking and her back arched. All he could see were the whites of her eyes. She then went limp. Expert testimony indicated this description fit the classic symptoms of a tonic seizure, which probably would not occur until more than two to three minutes after a severe shaking incident. In other words, it would be unlikely for a tonic seizure to be the first and most immediate symptom of a baby that had been severely shaken.

Mr. Jackson testified he "immediately" ran next door to call 911. He testified that only a "few minutes" elapsed between the time the appellant sped off and the time he knocked on the Harris door.

Neither Mr. Jackson nor the Harrises observed a visit to the appellant's apartment by Senior Airman (SrA) Warren, a patrolman assigned to Security Forces. He was on patrol that day when he received a dispatch to go to the appellant's home and advise her to contact her unit first sergeant. This was not an unusual event. Because the appellant did not have a phone in her apartment, the first sergeant used this method to contact her. The appellant told him she had been to an appointment and was on her way back to work. SrA Warren testified she did not appear angry, flushed, or excited and that she held Destiny on her left hip while standing in the door. He was within an arm's length of the appellant and Destiny and observed no signs of a struggle and heard no shouting, yelling, slamming, or throwing. He made eye contact with Destiny, who seemed "responsive." Upon delivering the first sergeant's message, he departed.

Based upon police and ambulance dispatch records, Sr A Warren's testimony, and the appellant's statements to investigators, the following chronology covers the 13-minute period from 1445 to 1458:

1445 hours-SrA Warren dispatched to deliver a message to the appellant
1450 hours-Approximate arrival of SrA Warren
1451 to 1452 hours-Approximate departure of SrA Warren
1456 to 1457 hours-Approximate departure of the appellant[3]
1458 hours-911 call from the Harris apartment

Law enforcement officials interviewed the appellant four times. In her first interview she attempted to explain Destiny's injuries by saying it was probably an accident at the hands of

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[3] In discussions with investigators afterwards, the appellant said she left her apartment approximately five minutes after SrA Warren arrived at the apartment.

Mr. Jackson. She claimed Mrs. Harris had told her that when Mr. Jackson brought Destiny over to her apartment to call 911, he shook Destiny vigorously trying to get a response-so vigorous, in fact, that Mrs. Harris had to tell Mr. Jackson to put Destiny down. Upon interviewing Mrs. Harris, investigators learned she had never witnessed Mr. Jackson shaking Destiny and, more importantly, she had never made such a statement to the appellant. Consequently, investigators began focusing on the appellant as the primary suspect.

In the second interview, the appellant admitted to investigators that she argued with Mr. Jackson for 20 to 30 minutes, but was adamant that she was not angry or frustrated. She told investigators Mr. Jackson was in the bathroom when SrA Warren came to the door and when she left the apartment. She also said she might have caused Destiny's injuries while tossing her in the air playfully or as she "jerked" around quickly after talking with SrA Warren. She also told investigators that Destiny was not crying when she left the apartment.

***654 Omissions in the Record of Trial**

During the course of the government's case-in-chief, the court reporting equipment malfunctioned.

Approximately 15 to 20 minutes of Mr. Jackson's testimony was lost. His direct and cross-examination were recorded, but the government's redirect and his responses to the court members' questions were not. Additionally, discussions concerning a government request to admit evidence went unrecorded.

The appellant contends the record of trial is incomplete and not substantially verbatim, as required by Rule for

Courts-Martial (R.C.M.) 1103(b)(2)(B), because of the partial loss of Mr. Jackson's testimony and the complete loss of the motion argument and ruling by the military judge. She asks that we disapprove her dishonorable discharge and any confinement in excess of six months. The government agrees that the omissions from the record were substantial, but contends the record is adequate to rebut any presumption of prejudice. If this Court were to determine prejudicial error as the result of the omissions, the government argues the proper remedy is to dismiss the affected charges without prejudice.

[1][2] Whether a record of trial is incomplete is a question of law we review de novo. *United States v. Henry,* 53 M.J. 108, 110 (C.A.A.F.2000). Records of trial that are not substantially verbatim or are incomplete cannot support a sentence that includes a punitive discharge, confinement in excess of six months, or forfeiture of pay for more than six months. R.C.M. 1103(b)(2)(B). *See also* Articles 19 and 54(c)(1), UCMJ, 10 U.S.C. §§ 819, 854(c)(1). The requirement that a record be complete and substantially verbatim is one of jurisdictional proportion that cannot be waived. *Henry,* 53 M.J. at 110; *see also United States v. Whitney,* 48 C.M.R. 519, 1974 WL 13848 (C.M.A.1974).

[3] Failure to comply with R.C.M. 1103(b)(2) "does not necessarily require reversal." *United States v. Abrams,* 50 M.J. 361, 363 (C.A.A.F.1999). However, a substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. *United States v. McCullah,* 11 M.J. 234, 237 (C.M.A.1981). In *McCullah,* our superior court concluded that the issue of what constitutes a substantial omission is reviewed on a case-by-case basis. *Id.*

a. Mr. Jackson's Testimony

[4] The trial participants agreed that Mr. Jackson's testimony could be reconstructed without the presence of the court members. Mr. Jackson was present and answered questions anew. The trial counsel repeated her redirect examination, and the military judge repeated the questions posed by the members. The military judged worked through the discrepancies the parties noticed and gained their assent to the modifications. Both sides asserted they were satisfied the reconstruction was accurate.

The government claims the record was adequately reconstructed so as to rebut any presumption of prejudice. A number of considerations support this position:

1. The omission was noticed immediately, and reconstruction efforts began while the testimony was still fresh in everyone's mind;
2. The military judge, three trial counsel, three defense counsel, the appellant, and the witness were present during the reconstruction;
3. The judge, the parties, and the witness took an active role in the reconstruction;
4. The parties and the judge relied not only on their recollection of the testimony, but also the notes they took while Mr. Jackson testified;
5. No one objected; and
6. The judge, counsel, and the appellant agreed the reconstruction was adequate.

On the other hand, the appellant highlights the critical, qualitative nature of Mr. Jackson's testimony. She also suggests that the military judge should have followed the methodology endorsed in *United States v. Watts,* 22 M.J. 909,

910 (A.F.C.M.R.1986), for correcting recording errors. Specifically, she believes the military judge should have instructed the court members to disregard Mr. Jackson's lost testimony and then recalled ***655** him to the stand to repeat the missing portions in front of them.

[5] Our careful review of the reconstructed testimony leads us to conclude that the government has overcome the presumption of prejudice as to Mr. Jackson's testimony. In addition to the considerations listed above, we note that the parties were meticulous in their re-creation of this critical evidence. Both sides frequently referred to their notes and modified Mr. Jackson's responses when they identified deviations or additions from his earlier testimony. Moreover, the court members' questions were in writing, and the military judge had the benefit of posing the exact questions initially addressed to Mr. Jackson. Further, we note that although the reconstruction was not done in front of the court members as suggested in *Watts*-the preferred method of dealing with such omissions-failure to do so is not dispositive. *See United States v. Griffin,* 17 M.J. 698, 699 (A.C.M.R.1983) ("The method of reconstruction is not a matter of principal concern").

b. The Motion

[6] At trial, it appears the parties believed the argument on the government's motion to admit evidence had been preserved, thus they made no effort to reconstruct it. Further, when it came time to authenticate the record of trial and take final action, no one addressed the omission.

Commendably, current court-martial practice does not involve the use of unrecorded sidebar conferences, but earlier in our history they were more routine and led to a fair amount of litigation. We find the current situation very similar to that

of an unrecorded sidebar conference, and thus turn to that body of law for guidance. "Not every sidebar conference must be recorded verbatim, but one involving a ruling by the judge *affecting rights of the accused* at trial must be fully recorded if the transcript is to be verbatim." *United States v. Gray,* 7 M.J. 296, 298 (C.M.A.1979) (quoting *United States v. Sturdivant,* 1 M.J. 256, 257 (C.M.A.1976) (per curiam)) (emphasis added); *see also United States v. Richardson,* 45 C.M.R. 157, 1972 WL 14146 (C.M.A.1972).

Because the government has conceded that this omission was substantial, we will only address whether the government has overcome the presumption of prejudice. We conclude the government has met that burden.

When the parties went back on the record after learning of the equipment malfunction, the judge said, "[T]he last thing that was recorded that could be detected was there had been a [government] motion for an admission of a prior consistent statement by Mr. Jackson. During a [session held pursuant to Article 39, UCMJ, 10 U.S.C. § 839], I went ahead and ruled against that particular motion." Thus, based solely upon the record, we do know the general nature of the evidence and the judge's ruling on it. *Cf. United States v. Desciscio,* 22 M.J. 684 (A.F.C.M.R.1986). The military judge ruled in favor of the appellant, and even after considering the trial defense counsel's post-trial affidavit, we are confident the appellant's interests were not prejudiced by the omission from the record.[4] *See*

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[4] In his affidavit, the trial defense counsel suggests that the government made comments about the proffered testimony in front of the court members. He states he cannot recall whether or not he asked the judge for a limiting instruction, which was his "usual practice" under such circumstances. Even after making all reasonable inferences in favor of the appellant, as required by *McCullah,* 11 M.J. at 237, we conclude his claim that he may have requested a limiting instruction is simply too speculative.

generally United States v. Simmons, 54 M.J. 883, 887 (N.M.Ct.Crim.App.2001).

Impeachment of Mr. Jackson with Prior Inconsistent Statements

[7] The appellant next argues the military judge erred when he denied her the opportunity to impeach Mr. Jackson with extrinsic evidence of prior inconsistent statements pursuant to Mil. R. Evid. 613(b). According to the appellant, two aspects of Mr. Jackson's testimony were inconsistent with statements he made to investigators. Only one merits discussion-whether Mr. Jackson's in-court testimony was inconsistent ***656** with a statement that Destiny was crying immediately after the appellant left the house.

For the defense, this was a key point given their theory of the case-that it was "more likely" Mr. Jackson who was responsible for shaking Destiny. Because expert testimony indicated an infant's crying often triggers inappropriate shaking, the defense argued Destiny's crying might have caused him to shake her out of frustration or in an effort to quiet her. Further, if Destiny was crying at this juncture, it may have indicated she was in a "lucid interval," a mental status that may have been medically inconsistent with the onset of a tonic seizure almost immediately after the appellant's departure.

Trial defense counsel cross-examined Mr. Jackson extensively about whether Destiny was crying when the

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Indeed, we find it more likely than not that the trial defense counsel is referring to an earlier, verbatim ruling where the trial counsel brought up Mr. Jackson's written statement, yet trial defense counsel did *not* ask for a limiting instruction.

appellant left the house. Mr. Jackson said he could not remember making a statement to that effect to investigators. Even after efforts to refresh his recollection, he did not remember saying the child was crying at that point in time. The trial defense counsel's proffer as to the inconsistent statement was that Mr. Jackson had told investigators that Destiny was "crying after [the appellant] left, and furthermore that he described the cry as 'crying as if she missed her mother because she had just left.' "

Mil. R. Evid. 613(b) states, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." If the witness admits the inconsistency, then extrinsic evidence is generally not admissible. If the witness denies making the statement, or equivocates, Mil. R. Evid. 613(b) authorizes the admission of these statements. *United States v. Meghdadi,* 60 M.J. 438, 444 (C.A.A.F.2005). However, such evidence is considered only for credibility purposes, not to establish the truth of the matter, i.e., it is admissible for impeachment rather than substantive purposes.[5]

As a preliminary matter, however, the proponent of the evidence must establish an inconsistency between the in-court and out-of-court statements. At trial, the military judge concluded that a failure to remember was not an inconsistency. He also concluded that Mr. Jackson never "denied that she was crying." Based upon these determinations, the military judge excluded the investigator's testimony.

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[5] However, if the evidence otherwise qualifies under Mil. R. Evid. 801(d)(1)(A), the evidence would be admissible as substantive evidence.

We will review his findings of fact and application of these facts to the law for an abuse of discretion. *United States v. Gore,* 60 M.J. 178, 187 (C.A.A.F.2004). This "standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.* This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F.2000). A military judge must be accorded reasonable discretion in determining whether a claim of faulty memory is inconsistent with statements previously given. *United States v. Insana,* 423 F.2d 1165, 1170 (2d Cir.1970).

In *United States v. Damatta-Olivera,* 37 M.J. 474, 478 (C.M.A.1993), the Court of Military Appeals noted, in dicta, that an assertion of an inability to recall is a sufficient basis to establish an inconsistency, stating: "[W]hether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position." *But cf. United States v. Grubbs,* 776 F.2d 1281, 1287 (5th Cir.1985) (a claim of faulty memory does not constitute an inconsistent statement).

Looking at Mr. Jackson's testimony broadly and in context, it would have been reasonable to determine his testimony at trial was inconsistent with his prior statement to investigators and that Mr. Jackson's responses to trial defense counsel's questions amounted to a denial or equivocation. But given the deference we apply when reviewing an evidentiary***657** ruling, we cannot conclude the military judge was unreasonable, and therefore abused his discretion by concluding otherwise.

[8] Moreover, even if we assumed the military judge erred in not allowing the appellant to put on extrinsic evidence

on this point, we do not find substantial prejudice to the appellant's material rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The appellant argues we must apply constitutional harmless error because her Sixth Amendment right to confront a witness was violated. If this were the case, we would reverse unless the government established that error was harmless beyond a reasonable doubt. But this stricter standard of review is appropriate only when cross-examination is limited "in a manner that precludes an entire line of relevant inquiry." *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F.2005). We will assess prejudice in this case by applying a harmless error analysis because the "relevant inquiry" was limited only as to extrinsic impeachment, not intrinsic impeachment.

The government's evidence, generally, was very strong. But on this point, it was overwhelming. The appellant herself told investigators that the baby stopped crying before she left. Ms. Harris also testified that Destiny stopped crying immediately after hearing a bang that knocked a picture off her wall and prior to the appellant's departure.

Additionally, the defense's cross-examination had already effectively impeached Mr. Jackson. When he failed to recall making the statement to investigators, trial defense counsel produced Mr. Jackson's written statement and had him review it in front of the members in an effort to refresh his recollection. Trial defense counsel also questioned him about the notes investigators made of the interview. The clear import of these trial tactics was that Mr. Jackson's statement did include a comment that Destiny cried after the appellant left the house. Thus, the defense successfully impeached Mr. Jackson's testimony *intrinsically* by referring to the written and verbal statements he made to investigators and attempting to refresh his recollection. Trial defense counsel used this impeachment extensively and effectively in his closing

argument. The presentation of testimony from the investigator would not have added significantly to the impeachment of Mr. Jackson or substantially furthered the defense's theory of the case.

Finally, even assuming Mr. Jackson did tell investigators that Destiny was "crying as if she missed her mother," such a description is ambiguous-it could describe a cry that is either a soft "whimper" or a vigorous wailing. Consequently, the excluded testimony is subject to varied interpretation, and thus its overall "materiality" and "quality" is rendered debatable. *See generally United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F.1999).

In view of these circumstances, we have no difficulty in concluding any error in excluding this evidence was harmless. *See Id.*

Profile Evidence

[9] Next the appellant contends that the military judge erred in allowing one of the government's expert witnesses to present "profile" evidence concerning a typical child abuser. Specifically, he challenges expert testimony from Dr. Sharon Cooper, a forensic pediatrician. Dr. Cooper testified that:

1. Biological parents are the most common people to fatally abuse their children;
2. The highest level of fatal child abuse is in infants under the age of 12 months;
3. The most significant trigger for a baby shaking incident is "persistent crying"; and
4. Medical professionals consider certain behavioral factors to determine if an injury is accidental or "inflicted."

The appellant did not raise this issue at trial, and thus we review for plain error using the three-part analysis established in *United States v. Powell,* 49 M.J. 220, 225 (C.A.A.F.1998).

After we received briefs and heard arguments on this case, our superior court decided *United States v. Traum,* 60 M.J. 226 (C.A.A.F.2004), *cert. denied,* 543 U.S. 1055, 125 S.Ct. 920, 160 L.Ed.2d 779 (2005), a case that involved a challenge to testimony very similar to that offered in the case before us. Indeed, Dr. Cooper also served as an expert ***658** witness in *Traum.* Our superior court held that expert testimony indicating a biological parent is "the most likely person to kill a child" was impermissible profile evidence. *Id.* at 233. The accused in *Traum* suffocated her 18-month-old child. She was home alone with the child at the time of the injuries, and the expert testimony could have only applied to her. In the case at hand, though, we have another parent as a potential suspect, and the testimony applied equally to both. Thus, on the facts before us, we conclude that admission of this testimony was an obvious or clear error, but otherwise harmless. *See Powell,* 49 M.J. at 225.

[10] As to Dr. Cooper's testimony that fatal child abuse is most common in infants under the age of 12 months, we find this to be permissible testimony about the "characteristics of a battered child." *See Traum,* 60 M.J. at 235. The same holds true for Dr. Cooper's testimony indicating that the most significant trigger for a baby-shaking event is persistent crying. Neither statement is impermissible profile evidence because of the focus on the child, rather than the parent. Consequently, we conclude this was not error, plain or otherwise.

[11] We next turn to the testimony concerning the behavioral factors used by medical professionals in reaching a

diagnosis of non-accidental injury. Dr. Cooper testified that doctors look at three things to determine whether an injury was intentional or accidental: (1) The history given by the person seeking medical care for the child and anyone else who may have been in the environment; (2) The behavior of those caring for the child; and (3) The findings from the physical examination. Because the Harrises' testimony established that Mr. Jackson was very caring and that the appellant appeared less so, the appellant argues this testimony effectively took Mr. Jackson out of the profile.

Dr. Cooper's testimony about this three-factor analysis was much the same as her testimony in *Traum.* Our superior court concluded her testimony describing the analysis was proper because the record supported a conclusion that this methodology was relied upon by experts in the field of forensic pediatrics. *Id.* at 234-35. *See also* Mil. R. Evid. 702. The same holds true in the present case. Dr. Cooper's testimony was provided "in the context of her general description of fatal child abuse." *See Traum,* 60 M.J. at 234. Moreover, apart from Dr. Cooper describing this analysis as one that doctors consider for diagnostic purposes, we are unable to discern any attempt by the government to create a "profile" of a typical child abuser by linking the Harrises' testimony to her expert testimony. In any event, the Harris testimony was independently admissible.

Uncharged Misconduct Involving Minor Parental Abuse

The appellant next argues the military judge erred in admitting uncharged misconduct evidence involving the testimony of three witnesses. *See* Mil. R. Evid. 404(b).

The first of these witnesses was Airman (Amn) Mills. She testified the appellant and Destiny were in her dormitory room a few weeks prior to 23 June 2000. The baby was

approximately five months old at the time and teething. She bit her mother's hand, and the appellant then "grabbed her and told her that it hurt." According to Amn Mills, the appellant "kind of bit her hand back." Destiny cried, but the bite did not cause any bleeding or marks. Amn Mills also testified that when Destiny "would try to reach for something that she didn't need to be touching or [the appellant] didn't want her to have, she would kind of flick her hand, like a pluck on the hand, and tell her to stop."

The second witness to testify was Staff Sergeant (SSgt) Quick, who was at a restaurant with the appellant and Destiny when the child became restless and irritable. According to SSgt Quick, Destiny was "fussing and kicking and fighting because she didn't want to sit down. And [the appellant] thumped her on the thigh." She described it as a loud flick that caused everyone in the restaurant to turn and look. Destiny cried, and the appellant told her she "knew better."

Mrs. Harris testified about another incident, stating: "It was in the afternoon time. I was at [the appellant's] house, and she was trying to put her shoe on to go somewhere. ***659** And Destiny would not hold her foot still to put her shoe on. [The appellant] ... jerked her by her arm real tightly and grabbed her face real tightly and squeezed her cheeks and called her stupid and ugly." The court members asked several questions about this, including whether it was just the one time, and Mrs. Harris indicated that it was only once. They also asked whether she saw other abusive behavior. The judge did not permit this question to be answered.

At trial, the appellant challenged this uncharged misconduct evidence in a motion in limine prior to the

presentation of evidence.[6] In ruling on the motion, the military judge applied the following three-part test found in *United States v. Reynolds,* 29 M.J. 105, 109 (C.M.A.1989), to determine admissibility under Mil. R. Evid. 404(b):

1. Does the evidence reasonably support a finding by the court members that the appellant committed the prior crimes, wrongs, or acts?
2. What fact of consequence is made more or less probable by the existence of this evidence? Mil. R. Evid. 401.
3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice? Mil. R. Evid. 403.

The military judge found the evidence sufficiently reliable to support a finding that the appellant committed these acts. On appeal, the appellant does not challenge this portion of the ruling. The record readily establishes that prong 1 of the *Reynolds* analysis was met, and so we turn to prong 2.

[12] Uncharged misconduct offered under Mil. R. Evid. 404(b) is not admissible if it "is offered simply to prove that an accused is a bad person." *United States v. Humpherys,* 57 M.J. 83, 90 (C.A.A.F.2002). *See also Huddleston v. United States,* 485 U.S. 681, 686, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) ("The threshold inquiry a court must make before admitting similar acts evidence under [Mil. R. Evid.] 404(b) is whether that evidence is probative of a material issue other than character."). However, it is a "rule of inclusion, not exclusion." *Humpherys,* 57 M.J. at 90.

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[6] The trial defense counsel appropriately challenged this evidence in a motion in limine. However, we note that military judges should exercise caution in ruling on the admissibility of uncharged misconduct evidence prior to the presentation of evidence and before its materiality is clearly established.

The military judge initially concluded the testimony of these three witnesses was admissible "to show a pattern of child abuse in the past and reflecting the intent of the accused for the acts alleged on 23 June 2000." He modified this in his final instructions to the court members, stating the evidence was admitted for the "limited purpose of its tendency, if any, to prove that the accused intended to murder or inflict great bodily harm upon Destiny Harrow, or to rebut the contention that the accused accidentally injured Destiny." On appeal, the government argues that the evidence is relevant to intent, that is, her "state of mind" on 23 June 2000, but does not rely on absence of an accident as instructed by the military judge.

[13] When uncharged misconduct evidence is offered to prove intent, "the relevancy of the other crime is derived from the accused's possession of the same state of mind in the commission of both [offenses]." *United States v. Rappaport,* 22 M.J. 445, 447 (C.M.A.1986). The state of mind does not have to be identical, but must be "sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." *United States v. McDonald,* 59 M.J. 426, 430 (C.A.A.F.2004). The link between the charged and uncharged misconduct must "permit meaningful comparison." *Id.*

The flicking, thumping, and biting incidents reflect a state of mind indicating the appellant responded to Destiny's irritating, yet normal, behavior with deliberate, inappropriate physical force. We find these incidents are highly similar to Mr. Jackson's description of the appellant grabbing Destiny off of the couch on the morning she was injured. He said the appellant held Destiny by one arm and jerked her around. In response to Mr. Jackson's plea to not take her anger out on Destiny, she replied, "I do what ***660** I want with my baby." When viewed in the context of all of the facts and

circumstances surrounding the appellant's state of mind on 23 June 2000, we are convinced that the intent behind the uncharged acts of misconduct was "sufficiently similar" to the charged offense to meet the second *Reynolds* prong.

Nonetheless, the appellant further argues that intent was not "in issue" and the challenged evidence should not have been admitted. Her strategy at trial was to develop and highlight any evidence that suggested Mr. Jackson was the one who injured Destiny. Although the defense did not concede the issue of intent or suggest that the members should consider one of the lesser-included offenses, they clearly focused on their theory that the evidence could not rule out Mr. Jackson as the perpetrator.

[14] We find no merit to this argument. A decision not to contest the issue of intent did not make otherwise proper evidence of uncharged misconduct relating to intent inadmissible. *United States v. Sweeney,* 48 M.J. 117, 120 (C.A.A.F.1998) (clarifying *United States v. Franklin,* 35 M.J. 311, 317 (C.M.A.1992)). *See also Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("the prosecution's burden to prove every element of the crime beyond a reasonable doubt is not relieved by a defendant's tactical decision not to contest an essential element of the offense"). *But cf. United States v. Diaz,* 59 M.J. 79, 95 (C.A.A.F.2003) (holding uncharged misconduct was not properly admitted to rebut an affirmative defense that was not raised); *United States v. Morrison,* 52 M.J. 117 (C.A.A.F.1999) (holding it was error to admit uncharged misconduct where motive and intent were clearly not at issue).

[15] Having concluded prong 2 of the *Reynolds* analysis is satisfied, we turn to the third prong and conclude it also has been met. The probative value of the testimony of the

three witnesses outweighed its prejudicial impact. We note that the uncharged acts of misconduct were close in time to the charged offense and involved the same victim. Additionally, the conduct is not so shocking as to have a dramatic prejudicial impact. The military judge did not abuse his discretion in admitting this evidence.

[16] Before leaving this issue, however, we note that, generally speaking, Mil. R. Evid. 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion. *See, e.g., United States v. Hays,* 62 M.J. 158 (C.A.A.F.2005); *United States v. Bresnahan,* 62 M.J. 137 (C.A.A.F.2005); *United States v. Rhodes,* 61 M.J. 445 (C.A.A.F.2005); *Diaz,* 59 M.J. at 79. Given this lack of predictability, we will continue our analysis by reviewing for harmless error. We test for harmlessness by determining:

> [W]hether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error. As we apply this standard, the defense must initially meet the threshold burden of showing that an error has occurred which is of such a character that its natural effect is to prejudice litigant's substantial rights. The burden then shifts to the Government to persuade us that the error was harmless.

***Rhodes,* 61 M.J. at 453 (internal quotations omitted).**

There was little risk the members improperly used this evidence to conclude the appellant was a bad person and thus was more likely to have murdered Destiny. Although the court

members asked a lot of questions about abusive behavior, the judge did not allow most of them, and he repeatedly admonished them that there was no evidence before them of other maltreatment or injury to Destiny. The military judge's instructions clearly told them that they could not use this evidence in that manner.

Moreover, as discussed previously, the government's case was exceptionally strong. The cause of Destiny's death and the date she was injured were not at issue. Intent-the reason this evidence was admitted-although not conceded, was not seriously challenged. During argument on findings, neither*661 side addressed this evidence either specifically or generically. Thus, the overall effect of this uncharged misconduct was not that significant.

The primary focus at trial was on who did it-the appellant or Mr. Jackson. The testimony of Mr. and Mrs. Harris and Mr. Jackson clearly established that the appellant was in an uncontrolled rage at the time the injuries would have occurred. The testimony of SrA Warren, that the appellant seemed in control of herself when he talked to her in the doorway, does not seriously discredit that testimony.

Additionally, the appellant admitted that at the time she departed the apartment, Mr. Jackson was in the bathroom and Destiny was on the couch, not crying. These admissions significantly damaged the appellant's theory of the case-that Mr. Jackson had sufficient time and motive to inflict the head injuries on Destiny after her departure. Given the two to three-minute period between the time the appellant left her apartment and when the 911 call was placed, it is unlikely Mr. Jackson would have had time to come out of the bathroom, observe the appellant depart in her car, shake Destiny, and then carry her to the Harris' apartment. Moreover, medical

testimony indicated it was unlikely Destiny would have entered into a tonic seizure in such a short time frame.

The government's evidence also clearly established the appellant's motive to kill or cause grievous bodily harm to Destiny. Witnesses detailed her increasing resentment of Destiny and how her birth had affected her financial and social situation and her relationship with Mr. Jackson.

The appellant also made several admissions or statements reflecting consciousness of guilt. She lied to several people who asked her how the injuries occurred by making clearly false statements that pointed the blame at Mr. Jackson. She also told investigators she was not going to stress over the investigation until they had proof. Additionally, she told several different stories about where she went after she departed the apartment, and lied to investigators when she denied having an argument at the apartment or that she was angry or frustrated when she left.

Finally, the appellant admitted she may have caused the injuries to Destiny by throwing her in the air in a playful manner or possibly when she quickly turned away from the door after SrA Warren departed. She agreed with investigators that either she or Mr. Jackson had to have caused Destiny's injuries, but ultimately told them she did not believe Mr. Jackson did it.

Applying the standard enunciated in *Rhodes*, 61 M.J. at 453, in conjunction with the long-standing four-part analysis established in *Kerr*, 51 M.J. at 405, we can say with "fair assurance" that the judgment was not substantially swayed by any error in admitting the testimony of the three witnesses.

Providency of Pleas

[17] Next the appellant challenges the providency of her guilty pleas to three specifications. We address only one: Whether her discussion with the military judge about a four-day absence without leave offense (terminated by apprehension) established a substantial basis for questioning the appellant's guilty plea. We conclude that it did.

Several months after Destiny's death, the appellant was on authorized leave. On the day she was to return from leave, her parents took her to a civilian mental health center. She stayed there for several days. She told the military judge, "I consented to be admitted, and when I was checked in I told them I was in the military. I asked them to call and tell my unit where I was. A couple of hours later, the [Air Force Office of Special Investigations] came and picked me up." The military judge asked her why she wanted hospital officials to notify military authorities. She told the judge she had seen medical providers there before and "was just letting them know where I lived at and that I was in the military." The judge then asked, "Did you disclose this to them because of your desire to return to military control?" She responded, "Yes, sir." Additionally, she said, "I told them to call, sir, to let my unit know where I was, but I didn't plan on coming back [to the base]. I planned to stay at the hospital."

***662** A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F.1996). "Pleas of guilty should not be set aside on appeal unless there is 'a "substantial basis" in law and fact for questioning the guilty plea.' " *Id.* at 375 (quoting *United States v. Prater,* 32 M.J. 433, 436 (C.M.A.1991)).

Article 86, UCMJ, 10 U.S.C. § 886, is "designed to cover every case not elsewhere provided for in which any member of the armed forces is *through the member's own fault* not at the place where the member is required to be at the prescribed time." *Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 10c(1) (2005 ed.)[7] (emphasis added). The record reveals a "substantial conflict" as to whether the appellant's mental health status precluded her ability to report to her place of duty in a timely fashion. We hold the military judge abused his discretion in accepting the appellant's plea to this offense. We dismiss this specification and next turn to whether we can reassess the sentence.

We conclude we can reliably determine what sentence the court members would have imposed if the error had not occurred. *See United States v. Sales,* 22 M.J. 305 (C.M.A.1986). After careful consideration of the entire record, as well as the maximum allowable punishment for a violation of Article 86, UCMJ, we are confident the court members would have adjudged a sentence of no less than a dishonorable discharge, confinement for 24 years and 6 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

CONCLUSION

Specification 2 of Additional Charge I is set aside and dismissed. The amended findings and the reassessed sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F.2000). Accordingly, the findings, as amended, and the sentence, as reassessed, are

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[7] This provision is the same in the 2000 edition of the *Manual,* which was in effect at the time of trial.

AFFIRMED.

Judge GENT participated in this opinion prior to her retirement.